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No. 209

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

STATE NEON SIGN CO., INC.,
Petitioner,

vs.

FRANKLIN LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit,
and Appendix.

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FRANKLIN LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on March 31, 1964, and motion for rehearing denied.

OPINIONS.

The judgment of the District Court is not reported. The Opinion of the U. S. Court of Appeals, Fifth Circuit, is 329 F. 2d 456 reported at 329 F. 2d 456 (Advance Sheets). The opinion is printed as an appendix.

JURISDICTION.

The opinion of the Court of Appeals reversed the judgment and verdict of the District Court. On May 22, 1964 the timely motion for rehearing was denied. The jurisdiction is invoked under 28 U. S. C. 1332, on the basis of diversity of citizenship of the parties.

QUESTIONS PRESENTED.

Where both parties agreed, with the approval of the court, that the case be submitted to the jury without the pleadings, on only one issue of fact: Whether a medical examiner for respondent did ask a material question of an applicant for insurance, which issue of fact, under Georgia law is exclusively a jury question, even though the application is signed by the insured, and the case with appropriate instructions was so submitted, and the jury returned a general verdict for the petitioner, and the court granted judgment, and subsequently denied a pending motion for a directed verdict,

Did the court of appeals, contrary to the provisions of Rule 50 (b), Rules Civil Procedure, and the law of Georgia, erroneously reverse the district court in ordering a judgment n. o. v. for respondent,

(1) on the ground that the evidence for petitioner was not positive and only an inference in favor of petitioner, when there was sufficient evidence to support the verdict;

(2) on the ground the insurance application was signed by the insured, and that therefore there was no issue present for the jury to pass on, despite the contested issue of fact in the case?

STATEMENT.

On June 10, 1959, Franklin Life Insurance Company issued two life insurance policies, based on one application, one in the amount of $25,000, and the other for $15,000, and both naming State Neon Sign Company as beneficiary.

On November 10, 1960, the insured died. The beneficiary filed proof of death and demanded payment of the proceeds of the policies. The insuror refused to pay the proceeds and tendered the premiums paid on them. Liability was denied upon the ground that the policies were based upon the written application signed by the insured, and that in the application the insured made misrepresentations which were material and changed the nature and extent of the risk and which avoided the policies.

The beneficiary filed suit in Fulton Superior Court, Georgia. On diversity of citizenship, the matter was removed to the federal district court and tried before a jury.

Although the respondent had alleged a number of misrepresentations in its pleadings as ground for non-payment of the insurance, during the course of the three-day trial, the controversy was reduced to one issue of fact, namely: Question Number 9 on the application. The evidence was in sharp conflict as to whether this question had been put to the insured.

The case turned on the testimony of the medical examiner and the general agent for the respondent. This examiner had on three previous occasions examined and approved the insured for life insurance.

The evidence further showed that the general agent, whom the insured had trusted in insurance matters over the years, improperly caused the insured to drop an equal amount of insurance then in force, and beyond the contestability period, in order to apply for and secure the

subject insurance. That by this substitution of insurance the insured was adding nothing to his life insurance program. That there was no clear reason for the new insurance policies other than to benefit the agent with commissions, by what is known in insurance circles as "twisting"—the dropping of valid policies for new policies, for the sole gain of the writing agent.

At the conclusion of the evidence, respondent moved for a directed verdict. The trial judge reserved decision on this motion and permitted the case to go to the jury on one (agreed) question of fact. The parties stipulated, with the approval of the court, that the jury consider the case without the pleadings, and the matter was so submitted with appropriate instructions (Trans. Vol. I, p. 341).

The jury and judge were not impressed with the testimony of the medical examiner and the agent. They were each found to be untruthful on the writing of the application for the subject insurance. The jury and judge did not believe that the material question involved had been asked of the insured by the medical examiner; and therefore that the insured did not make any material misrepresentation in the application for the insurance.

The jury returned a general verdict for petitioner. The court entered judgment for $40,000. Thereafter, the court denied the respondent's pending motion for a directed verdict.

The respondent then filed its motion for judgment n. o. v. or, in the alternative, the granting of a new trial. The court denied these motions as being without merit. Respondent appealed and on March 31, 1964, the court of appeals reversed the district court and ordered judgment for respondent. Petitioner's timely motion for rehearing was denied.

REASONS FOR GRANTING THE WRIT.

There Was Only One Issue of Fact for the Jury.

This case turned on only one issue of fact for the jury to pass on, as agreed by both sides, and the trial judge. It dealt with whether or not a certain question on the insurance application had been asked by the medical examiner for the insurance company. (Trans. Vol. I, pp. 57, 58.)

Respondent made this statement:

> "Now, if it please the Court, as I understand the case as it stands right now, THE ONLY ISSUE OF FACT TO BE SUBMITTED TO THE JURY IS IN RESPECT TO QUESTION NO. 9 ON THE APPLICATION, and if this is true, then I should like to limit my discussion of the case with the jury to that proposition, although, of course, I shall illustrate my propositions perhaps by some other things." (Trans. Vol. I, p. 340.)

The Trial Judge included in the instructions to the jury:

> "You will also determine from the evidence you have heard whether you, in fact, believe that the question concerning the insured's prior health and treatment was ever put to him, Mr. Pickett, and whether the answers recorded on the medical examiner's report was actually given. **These constitute areas of disagreement between the parties, and are issues which you must determine before you can reach a verdict in this case.** (Trans. Vol. I, pp. 345, 346.)

The jury had no need for the pleadings to decide this one issue of fact; by stipulation of the parties and ap-

proval of the court, the pleadings did not go out with the jury. (Trans. Vol. I, p. 341.) There was no contention as to the health of the insured, since the Respondent had so agreed. (Trans. Vol. I, p. 70.)

Under the law of Georgia, the issue as to whether any question on an application for life insurance was asked of the applicant and answered by him, is always for the jury to pass on, as a question of fact.

The many decisions of the appellate courts of the state are uniform on this point of law.

Bankers Health & Life Insurance Co. v. Kimberly, 60 Ga. App. 128, 3 S. E. 2d 148;

Mutual Life Insurance Co. v. Brown, 34 Ga. App. 301, 129 S. E. 307, Cert. denied;

Metropolitan Life Insurance Co. v. Marshall, 65 Ga. App. 696, 16 S. E. 2d 33, Cert. denied.

The Insured's Signature on the Application Did Not Preclude Recovery, Because of the Facts Involved.

Under the law of Georgia, the signature on the application is not conclusive. The burden is always on the insurance company to prove the insured gave the alleged wrong answer. **This it failed to do in the instant case.** Clearly, there appears no valid reason why the circuit court should, in its estimation of the evidence, reverse the verdict of the jury. It was for the jury to believe, or not believe, the medical examiner, and not for the circuit court to pass on his credibility, or the positiveness of the evidence.

The court of appeals has cited **State Farm Mutual Automobile Insurance Co. v. Anderson,** 107 Ga. App. 348, 130 S. E. 2d 144, as authority for reversing the instant case when the same is in **direct conflict** with **Pacific**

Mutual Insurance Company v. Barfield, 57 Ga. App. 43, 194 S. E. 258, Certiorari denied, both decisions of the Georgia Court of Appeals.

In the State Farm case—

The same was an **automobile** liability case in which the insured denied that he gave any wrong answer to the writing agent. No fraud was involved, nor was the insurance company witness impeached. The state appeals court correctly held that **in the absence of fraud,** that the signature on the application would control the issue.

In the instant case—

The medical examiner testified that he asked the material question (No. 9) of the insured. On cross-examination he was a poor witness. His evasiveness, lack of memory, contradictions and his flat repeated denials of his not changing answers—which were in his own handwriting—a matter of documentary evidence, together with his demeanor (Trans. Vol. I, pp. 178-201), amply authorized the trial jury and judge to discredit his testimony.

The testimony of the general agent was untrustworthy. On cross-examination, he admitted he asked only a fraction of the questions on the application.

The State Farm case is therefore not controlling. The **evidence in the instant case is replete with fraud** on the part of the general agent and the medical examiner. They were both discredited and impeached, in toto.

In Pacific Mutual, supra, the insurance company defended on the ground of misrepresentations in the application as to past medical history, and that the insured had signed the application and certified to the correctness of the answers on the same. However, despite this condition, the insured was permitted to testify that he did not give

the answers shown on the application. The jury found for the insured, that he did not give the answer shown on the application, despite his signing and certifying to the same. The state appeals court affirmed, and the Supreme Court of Georgia denied certiorari. **This decision has not been reversed, criticized or distinguished by any later decisions.** It is the present law of Georgia.

This court has followed the Georgia decisions that once the policy has been issued, the insured is therefore under no duty afterwards to make an examination of the policy to ascertain upon what representation the policy is purported to have been issued.

John Hancock Mutual Life Insurance Co. v. Yates, 299 U. S. 178, 57 S. Ct. 20, certiorari from Georgia;
John Hancock Mutual Life Insurance Co. v. Yates, 50 Ga. App. 713, 719, 179 S. E. 239;
Mutual Life Insurance Co. v. Brown, 34 Ga. App. 301, 129 S. E. 307, certiorari denied.

In Effect, We Must Consider That the Policies Were Issued Without Questions 6 and 9 on the Application. No. 6 Had No Answer, While No. 9 the Jury Decided, Was Not Asked.

Under the Georgia law and John Hancock cases, supra, the insured was not required to check the policies, to see on what representations they were issued. He had the right to rely on the extent of the examination and questioning by the insuror's agent—the medical examiner.

On this premise, attention is called to Question No. 6 on the subject application (Trans. Vol. I, p. 192).

> "6. Have you ever piloted an airplane, received instructions in flying or do you contemplate so doing? If so, give complete details."

Candidly, we must agree that the question is of importance for the insuror, in assuming the risk. However, **there is no answer shown.**

On cross-examination, the examiner testified **he did ask the question but through error, he did not write the answer.**

If the insured had died piloting his own plane, the insuror could not have denied liability on the ground of misrepresentation in that the insured did not reveal his personal flying activity. Therefore, the materiality of this question could never be raised, since no answer could be charged to the insured.

The same theory must be applied as to the wrong answer to Question No. 9. In this instance, the **jury and the judge did not believe** that the **question was asked** of the insured. It follows that the answer appearing on the application was not the answer of the insured, and hence, there could have been no misrepresentation by the insured.

A blank answer is no different than an answer not that of the insured. The trial court settled that issue.

This court has held that the provisions of Rule 50 (b) have not taken away from the juries and given to the judges any part of the exclusive power of juries to weigh evidence.

Berry v. United States, 312 U. S. 450, 61 S. Ct. 637.

The instant case, as authorized by Pacific Mutual, supra, permitted the trial jury to pass on the one agreed question of fact: This they did, and the matter should rest there.

In **Evans & Pennington v. Scofield Sons Co.,** 120 Georgia 961; 48 S. E. 358 (a single witness case) the Supreme

Court of Georgia held that: "The plaintiff proved its case and then disproved it". Exactly that happened in the instant case. First the medical examiner testified that he did ask the material question, and made out a prima facie case, and then on cross-examination destroyed his testimony by his complete impeachment. This court has held that **evidence tested by cross-examination, protects against falsehood**, at 482, **Edwards v. U. S.**, 312 U. S. 473; 61 S. Ct. 669.

Since law suits are not tried by the square and compass, but by the innate sense of justice of the trial jury and judge, whose duty it is to try the facts, and from the facts arrive at a just and impartial result, the circuit court would be in error to weigh the facts for a second time.

When the evidence presents a tangled web of uncertainty as to what is the real fact relative to a material issue in the case, under the Georgia law, there is nothing to do but let the jury untangle the facts, and if in so untangling them, their findings of fact are supported by any evidence, it is the rule to accept and leave such findings of fact alone.

Southern Life Insurance Company v. White, 60 Ga. App. 414, 3 S. E. 2d 849;

Malleable Iron Range Co. v. Caffey, 64 Ga. App. 497, 15 S. E. 2d 822.

The physician of the insurance company is the agent of the company designated by the insurance company to examine applicants for insurance, and information given to the examiner is information to the company, regardless if answers appearing on the application contain information to the contrary.

If the question was not asked of the insured—and **that is what the jury and trial judge believed**—then it should

make no difference what answer the doctor-agent wrote on the application.

Parole evidence is admissible to show this fact. To hold otherwise would be to make a rule of evidence adopted as a protection against fraud an instrument of the very fraud it was intended to prevent. **Massachusetts Bonding and Insurance Company v. Williams**, 123 Fla. 560; 167 So. 12.

Brown v. Mutual Life Insurance Co., 29 Ga. App. 794 (2), 116 S. E. 559.

The Verdict of the Jury Based on Reasonable Inference Is Valid.

The Circuit Court has held in reversing the trial court that the evidence on behalf of petitioner was not positive and that at most it was by inference. The Georgia law on evidence provides:

> "Inference of Existence of Certain Facts: In arriving at a verdict the jury, from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved."
>
> Code Section 38-123.

This view is also supported by this court. Hence we must assume as established all the facts that the evidence supporting plaintiff's claim reasonably tends to prove, and there should be drawn in its favor all the inferences fairly deductible from such facts.

Lumbra v. United States, 290 U. S. 551, 54 S. Ct. 273;
Shenker v. Baltimore & Ohio Railroad, 374 U. S. 1, 83 S. Ct. 1667;
Independent Life & Accident Insurance Company v. Thornton, 102 Ga. App. 285, 115 S. E. 2d 835.

CONCLUSION.

Wherefore, upon the foregoing grounds, it is respectfully urged that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion of the Court of Appeals.

United States Court of Appeals
For the Fifth Circuit.

No. 20300.

The Franklin Life Insurance Company,
Appellant,

versus

State Neon Sign Company, Inc.,
Appellee.

Appeal From the United States District Court for the Northern District of Georgia.

(March 31, 1964.)

Before Tuttle, Chief Judge, and Brown, and Bell, Circuit Judges.

Bell, Circuit Judge: State Neon Sign Company, the appellee here and the plaintiff below, was named beneficiary under two policies of insurance issued by Franklin Life Insurance Company upon the life of its president, Mr. Pickett. These policies were issued in 1959 and Mr. Pickett died in 1960, some seventeen months later but within the period of contestability. Franklin Life de-

clined to pay on the policies, and tendered back the premiums paid which tender was refused. The suit which is the basis of this appeal followed, and judgment was entered on a jury verdict for the beneficiary.

It has been the position of Franklin Life throughout that the insured made a material misrepresentation which changed the nature, character and extent of the risk. The policies were issued partly in consideration of written applications executed by the insured, and which were attached to and made a part of each policy. The policy and the application, under the terms of each of the policies, constituted the entire contract between the parties. The applications each provided that all statements given to the medical examiner and contained in the application were full, complete and true, and it was agreed that no information acquired by the medical examiner, or any agent of the company, would bind the company unless it was set forth in writing in the application.

The immediate cause of the death of the insured, according to the death certificate, was "Coronary Thrombosis due to Arteriosclerosis Coronary." Question 9 on each of the applications inquired as to whether the insured had ever had pain in the chest, palpitation, shortness of breath, heart attack, heart murmur, high blood pressure, varicose veins, or any other disease of the heart or blood vessels. The answer recorded by the examining physician in both instances was "no". The fact was that the insured was hospitalized for a period of approximately four weeks in 1950 because of a coronary thrombosis with myocardial infarction.[1]

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[1] With respect to question 18 of the applications inquiring whether the insured had been under observation or treatment in a hospital, the answers are recorded in the affirmative. However, under § 24 of each application calling for the particulars with respect to question 18 where answered in the affirmative, the in-

The law of Georgia is that a false representation contained in an application for insurance which changes the nature, extent, or character of the risk voids the policy. §§ 56-820, 56-908, Code of Georgia, 1933. Code § 56-908 speaks in terms of a material misrepresentation, and **Preston v. National Life & Accident Ins. Co.**, 1943, 196 Ga. 217, 26 S. E. 2d 439, 148 A. L. R. 897, construes these statutes to mean a substantial increase in the risk. See our cases of **Mutual Benefit Health & Accident Association v. McCranie**, 5 Cir., 1949, 178 F. 2d 745; and **Martin v. Metropolitan Life Insurance Company**, 5 Cir., 1951, 192 F. 2d 167, in this connection. And where, as here, the applications for insurance are attached to and made a part of the policies, it is not necessary to show any knowledge of the falsity by the insured because there is no issue of fraud or bad faith. It is only necessary to show that the applicant made a material representation that was untrue. **Preston v. National Life & Accident Ins. Co.**, supra; **Supreme Conclave v. Wood**, 1904, 120 Ga. 328, 47 S. E. 940; **Kennesaw Life & Accident Ins. Co. v. Hubbard**, 1962, 106 Ga. App. 556, 127 S. E. 2d 845; and **Jefferson Standard Life Insurance Company v. Fendley**, 1937, 55 Ga. App. 618, 190 S. E. 806. See also **Smith v. John Hancock Mutual Life Insurance Co.**, 5 Cir., 1957, 249 F. 2d 657.

With this background of authorities in mind, we proceed to a discussion of the controlling issue presented by this appeal. Franklin Life, under the pleadings and obtaining law, assumed the burden of proving that the insured made the representation in question and that it

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formation recorded is that the insured had been in the hospital because of passing a kidney stone in 1958, and in 1944 because of gun-shot wounds while serving in the Navy. No mention was made of the confinement due to the 1950 coronary. The parties limited the misrepresentation question at the close of the evidence, but prior to submission to the jury, to questions 9 and the answers thereto.

was untrue, and material in that it influenced the insurer's acceptance of the risk. In this regard, its position is that the District Court erred in failing to direct a verdict for it, and in failing to grant its motion thereafter made for judgment notwithstanding the verdict.

In the beginning, we remove any question as to the representation in each application having been false and material. The evidence will not admit of a contrary inference, and was therefore not a proper subject matter for jury inquiry. **Supreme Conclave v. Wood,** *supra*; **Empire Life Ins. Co. v. Jones,** 1914, 14 Ga. App. 647, 82 S. E. 62; and **Kennesaw Life & Accident Ins. Co. v. Hubbard,** *supra.* This leaves the issue of whether the representation in either or both of the applications was made by the insured at all, and this was submitted to the jury in terms of whether the questions were put to the insured, and whether the recorded answers were actually given.

The relevant proof on behalf of the insurance company consisted of the policies, the attached applications, and the testimony of the examining physician that he made out the applications, got the answers thereon from the insured; and that the insured signed the applications after the physician had completed them. On cross-examination he admitted in substance that he had no independent recollection of these facts but that his testimony was based on his custom and practice.

The contrary proof showed discrepancies with regard to other questions on these and prior applications as respected answers in that some were not answered. Others were answered by estimation. Weight was an example of this. Moreover, the jury could have believed that some answers were changed from yes to no although as to some instances this was denied by the medical examiner. Further, it appeared that the medical examination in question

was made at the office of the insured in a somewhat casual manner. This was true also as to examinations for insurance in 1954, 1956 and 1958, and it may be mentioned in passing that the fact of the 1950 coronary was not disclosed in the report of any of these examinations. At any rate, the examiner was the only witness offered as to the questions and answers, and since the burden was on the insurance company, the theory was that it was for the jury to determine his credibility, and thus whether the questions were put, and the correct answers recorded.

With respect to this issue, it is sufficient to say that appellant insurance company must prevail. We are bound to follow the Georgia law in a diversity case, **Erie v. Tompkins**, 1938, 304 U. S. 62, 58 S. Ct. 817, 82 L. Ed. 1188. In this connection, we deem the case of **State Farm Mutual Automobile Ins. Co. v. Anderson**, 1963, 107 Ga. App. 348, 130 S. E. 2d 144, to be controlling.[2] Certiorari was granted by the Supreme Court of Georgia but upon reexamination that court, with three judges dissenting, reached the conclusion that certiorari had been improvidently granted, and dismissed. 219 Ga. 211, 132 S. E. 2d 556.

That case involved automobile liability insurance. The insurer denied coverage on the basis that in procuring the policy the insured had made a false and material statement consisting of a denial that he had ever had a liability insurance policy cancelled. The insured denied that the question was ever asked him by the agent, and also denied that he had made any false statement concerning it. The undisputed evidence was that a previous liability policy held by the insured had been cancelled, and that the insured signed the application after it had

[2] This case was decided after the decision of the District Court which is complained of here, and after notice of appeal had been filed.

been completed. The court distinguished **Tallent v. Safeco Ins. Co. of America,** 1959, 99 Ga. App. 11, 107 S. E. 2d 331, which held that whether or not the insured made a false representation presented a jury question. The basis of the distinction was that there the insured signed the application in blank. **Stillson v. Prudential Ins. Co. of America,** 1947, 202 Ga. 79, 42 S. E. 2d 121, was also distinguished. It involved a question of untrue representation with regard to a previous heart disorder. The agent was given correct information but failed to record it properly, and secured the signature of the insured to the application while holding his hand over the application, and after falsely reading the answer to the insured. It thus turned on the fraud or misconduct of the agent of the insurance company. The same point seems to be the rationale of the progeny of **Stillson** although the misconduct of the agents in these cases does not rise to the level of **Stillson.** See **Barber v. All American Assur. Co.,** 1953, 89 Ga. App. 270, 79 S. E. 2d 48; **George Washington Life Ins. Co. v. Smith,** 1954, 90 Ga. App. 459, 83 S. E. 2d 302; and **National Life & Acc. Ins. Co. v. Goolsby,** 1955, 91 Ga. App. 361, 85 S. E. 2d 611.

There is no discussion in any of these cases of what appears to be the *ratio decidendi* of the **State Farm** case, i. e., that notwithstanding the conduct of the agent in failing to ask the question or in improperly recording the answer, where the application is complete when executed, the insured is bound by the untrue answer contained in the application. In this respect it appears to be a case of first impression in Georgia. Cf. **Curry v. Washington Nat. Ins. Co.,** 1937, 54 Ga. App. 590, 188 S. E. 741, **Curry v. Washington Nat. Ins. Co.,** 1938, 56 Ga. App. 809, 194 S. E. 825; and see generally 17 Appleman, Insurance Law and Practice, §§ 9045 and 9046. Of course, **Stillson** having been distinguished, fraud or mis-

conduct of the type there involved would be outside this rule.

The case at bar cannot be distinguished from the **State Farm** rule. If anything, it is stronger for the insurance company. The evidence that the questions were not put, or that the answers were improperly recorded was much less positive. In fact, it was based on inference only. It also appears without dispute that the insured signed each application after it had been completed, and that the applications contain the following language just above the signature of the insured:

> "I hereby certify that my answers are correctly recorded . . ."

This being the law of Georgia, it necessarily follows that the beneficiary here was barred from recovery by false representations contained in the applications when they were executed by the insured. It was thus error for the District Judge to have overruled the motion of appellant for a directed verdict, and thereafter the motion for judgment notwithstanding the verdict on the state of the record as it then existed in the District Court.

Reversed and Remanded for further proceedings not inconsistent herewith.

United States Court of Appeals
For the Fifth Circuit.

No. 20300.

No. 7547.

The Franklin Life Insurance Company,
Appellant,

versus

State Neon Sign Company, Inc.,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before Tuttle, Chief Judge, and Brown and Bell, Circuit Judges.

Judgment.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is further ordered and adjudged that the appellee, State Neon Sign Company, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

March 31, 1964.

Issued as Mandate:

In the United States Court of Appeals
For the Fifth Circuit.

No. 20,300.

The Franklin Life Insurance Company,
Appellant,

v.

State Neon Sign Company, Inc.,
Appellee.

Appeal From the United States District Court for the Northern District of Georgia.

On Petition for Rehearing.

(May 22, 1964.)

Before Tuttle, Chief Judge, Brown and Bell, Circuit Judges.

Per Curiam:

It is Ordered that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby Denied.